A

Tan Thian Wah v Tan Tian Tiok & Ors

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24–417 OF 1997
SURIYADI J
28 MARCH 1998

B

***Evidence** — Privilege — Legal professional privilege — Application for a copy of deceased's will — Whether possible beneficiaries automatically acquired right to a copy of deceased's will — Whether privilege been terminated by death of testator — Evidence Act 1950 s 126 — Probate and Administration Act 1959 s 41*

C

The applicant, the son of the late Tan Hon Huah ('the deceased'), by virtue of being a beneficiary, wrote to the defendant legal firm — whom the former believed was in possession of a will made by the deceased ('the will') — for a copy of the will but did not receive any positive response. Subsequently, the applicant applied by virtue of

D

s 41 under Pt III of the Probate and Administration Act 1959 ('the Act') for a copy of the will.

Held, dismissing the application with costs:

E

The proviso of s 126(1)(a) and (b) of the Evidence Act 1950 provides that any papers including any correspondence, communication or matters relating to them would be privileged from discovery and thus disentitle strangers from inspecting them. In the present case, the applicant was not the client of the solicitor and merely a possible beneficiary of the estate. With the death of the client, the executors of the estate stepped into the shoes of the late client with the solicitors

F

now subject to the administrative instructions of the executors and the prevailing legal interest. On that score, even though the applicant was one of the possible beneficiaries, with the testator dead, that did not automatically mean he had acquired certain rights that could circumvent s 126 of the Evidence Act 1950 nor had the privilege

G

been terminated by that death. Moreover, there was no legal impediment as to why the applicant should not request the trustees or executors of the estate of the deceased for a copy of the will, or to request them to permit their solicitors to release a copy of the will. Thus, the application of the applicant pursuant to s 41 of the Act was rejected (see pp 804F–G and 805C–D, H–I).

H

[Bahasa Malaysia summary

Pemohon, anak lelaki mendiang Tan Hon Huah ('si mati'), selaku seorang benefisiari, telah menulis kepada firma guaman defendan —

I

yang dipercayainya memiliki suatu wasiat yang dibuat oleh si mati ('wasiat tersebut') — untuk sesalinan wasiat tersebut tetapi tidak menerima sebarang jawapan yang positif. Kemudiannya, pemohon memohon menerusi s 41 di bawah Bah III Akta Probet dan Pentadbiran 1959 ('Akta tersebut') untuk sesalinan wasiat tersebut.

Diputuskan, menolak permohonan dengan kos:

Proviso s 126(1)(a) dan (b) Akta Keterangan 1950 memperuntukkan bahawa apa-apa kertas termasuk sebarang surat-menyurat, komunikasi atau perkara yang berkaitan dengannya dilindungi daripada penzahiran dan justeru itu tidak memberi hak kepada pihak yang tidak dikenali daripada memeriksanya. Dalam kes ini, pemohon bukanlah klien peguamcara dan cumalah bakal benefisiari harta pusaka itu. Dengan kematian klien, wasi-wasi harta pusaka menggantikan tempat mendiang klien dengan peguamcara kini menjadi tertakluk kepada arahan administratif wasi-wasi dan kepentingan undang-undang yang berkuatkuasa. Tentang hal itu, walaupun pemohon adalah salah satu daripada bakal benefisiari, memandangkan pewasiat telah meninggal dunia, ini tidak secara automatik bermakna dia telah memperolehi hak tertentu yang boleh memintasi s 126 Akta Keterangan 1950 ataupun hak itu telah ditamatkan oleh kematian itu. Tambahan pula, tiada penghalang undang-undang tentang mengapa pemohon tidak harus meminta pemegang amanah atau wasi harta pusaka si mati untuk sesalinan wasiat tersebut, atau untuk meminta mereka supaya melepaskan sesalinan wasiat tersebut. Justeru itu, permohonan pemohon menurut s 41 Akta tersebut ditolak (lihat ms 804F–G dan 805C–D, H–I).]

Notes

For cases on privilege, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1376–1400.

Cases referred to

Bullivant & Ors v The Attorney General for Victoria (on behalf of Her Majesty) [1901] AC 196 (refd)
Bullock & Co v Corry & Co (1877–78) 3 QBD 356 (refd)
Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors [1989] 3 MLJ 445 (refd)
KC Sonrexa v State of Uttar Pradesh AIR 1963 All 33 (refd)
O'Rourke v Darbishire & Ors [1920] AC 581 (refd)
Peter Chi Man Kwong & Anor v Ronald Lee Kum Seng [1985] 1 MLJ 21 (refd)
Russell v Jackson (1851) 9 Hare 387 (refd)
Queen, The v Cox & Railton (1884–85) 14 QBD 153 (refd)

Legislation referred to

Evidence Act 1950 ss 126, (1)(a), (b), 128, 129
Probate and Administration Act 1959 s 41, Pt III
Rules of the High Court 1980 O 59 r 8

Jasmin Salleh (*Harbans, Wan Salina, SS Gill & Co*) for the plaintiff.
FH D'Cruz (*SK Khoo & Tan Tian Tiok*) for the third defendant.

Suriyadi J: The applicant is the son of the late Tan Hon Huah who died on 29 April 1994 and who believed that Messrs SK Khoo & Tan Tian Tiok, a firm of solicitors, was in possession of a will made by the deceased. By virtue of being a beneficiary, the applicant wrote to the said legal firm for a copy of that will, but was rebuffed as there were objections to the will by members of the family. Subsequent communications were also made by the applicant's solicitors to Messrs SK Khoo & Tan Tian Tiok (the defendant) but again did not receive any positive response. It would appear that Mr Tan Tian Tiok, a member of the legal firm of Messrs Tan Tian Tiok is also one of the beneficiaries of the late Tan Hon Huah's estate.

Frustrated with its lack of success, the applicant came before me for a copy of that will. On the law proper, counsel for the applicant brought to my attention s 41 under Pt III of the Probate and Administration Act 1959 which reads:

> The Court may, on the application of any person interested, if it appears that there is reason to believe that any will or other testamentary document of a deceased person is in the possession or under the control of any person, or that any person had knowledge of the existence of such a will or document, order that the person do, within a time named, produce the will or document at the Registry, or attend at a time named before a Court, for the purpose of being examined in relation to that document.

For purposes of our case the relevancy of ss 126, 128 and 129 of the Evidence Act 1950 become eminent and for purposes of convenience and reference, I reproduce them. They read:

> 126 Professional communications
>
> (1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:
>
> Provided that nothing in this section shall protect from disclosure —
>
> (a) any such communication made in furtherance of any illegal purpose;
>
> (b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.
>
> (2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.
>
> ...
>
> 128 Privilege not waived by volunteering evidence
>
> If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and if any party to a suit or proceeding calls any such advocate as a witness, he shall be deemed to have consented to the disclosure, only if he questions the advocate on matters which but for such question he would not be at liberty to disclose.

129 Confidential communications with legal advisers

No one shall be compelled to disclose to the court any confidential communication which has taken place betewen him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

It may be interpreted by a cursory perusal of the above provisions that unless there is permission from the client to the advocate, to disclose any communication for the purpose of his professional employment, no disclosures will be allowed. Here certainly there is none. That privilege of non-disclosure rather, is a privilege bestowed on the client of an advocate and solicitor, with the latter incapable of acting on his own volition (see *Peter Chi Man Kwong & Anor v Ronald Lee Kum Seng* [1985] 1 MLJ 21). This consent may be given expressly or impliedly (see *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445). It is trite that no protection will be accorded if that communication was made in furtherance of any illegal purpose or the advocate has observed a fact showing that a crime or fraud has been committed since the commencement of his employment (see *O'Rourke v Darbishire & Ors* [1920] AC 581; *The Queen v Cox & Railton* (1884–85) 14 QBD 153; s 126 of the Evidence Act 1950). To wind up the legal principle regarding solicitor/client privilege, suffice for me to say that the immunity from disclosure, which can be claimed by a client in respect of a communication made to an advocate is not absolute but limited by the scope of s 126 of the Evidence Act (*KC Sonrexa v State of Uttar Pradesh* AIR 1963 All 33).

As provided by the proviso of s 126(1)(a) and (b) of the Evidence Act 1950, with special reference to the current case, any papers including any correspondence, communication or matters relating to them would be privileged from discovery and thus disentitling strangers from inspecting them (see *Bullock & Co v Corry & Co* (1877–78) 3 QBD 356). In the present case, it is quite obvious that the applicant is not the client of the solicitor and merely a possible beneficiary of the estate. With the death of the client, the executors of the estate step into the shoes of the late client with the solicitors now subject to the administrative instructions of the executors and the prevailing legal interest. A rather old case which may be of some assistance to the current case, is that of *Russell v Jackson* (1851) 9 Hare 387. The facts of this case reveal that the testator made a will and bequeathed the residue of his estate to one Jackson and another person named Aston. A will was prepared by a solicitor called Solomon Bray who continued his services with the two beneficiaries. A 'case' took place and the next of kin, a third party, wanted the communications surrounding the will between Solomon Bray and the testator be revealed. Solomon Bray demurred that these communications were protected and privileged. The Vice Chancellor Sir GJ Turner upheld the objections and opined that the instructions pertaining the will by the testator to the solicitor was in the course of professional business. His Lordship was of the view that the privilege did 'not belong to the executors as against the next of kin, but,

following the legal interest, is subject to the trust and incidents to which the legal interest is subject'.

A particular remark made by Lord Lindley in *Bullivant & Ors v The Attorney General for Victoria (on behalf of Her Majesty)* [1901] AC 196 at 206 is also of relevance especially when his Lordship said:

> It is said that, the testator being dead, the privilege is gone. My Lords, I am satisfied that that answer is insufficient. I never heard it before; ... The mere fact that a testator is dead does not destroy the privilege. The privilege is founded upon the views which are taken in this country of public policy, and that privilege has to be weighed, and unless the people concerned in the case of an ordinary controversy like this waive it, the privilege is not gone — it remains.

On that score even though the applicant is one of the possible beneficiaries, with the testator being dead, that does not automatically mean he has acquired certain rights that could circumvent s 126 of the Evidence Act 1950 nor has the privilege been terminated by that death. One must not ignore the obvious that the applicant and the estate, which are two separate entities, and by virtue of the testator's death are now subject to the laws of trust.

Even though one of the beneficiaries, ie Mr Tan Tian Tiok, is also an advocate and solicitor in Messrs SK Khoo & Tan Tian Tiok and therefore has the advantage over the applicant, in no uncertain terms that privilege is not eroded or increased by virtue of that relationship. In the case of *O'Rourke v Bardishire & Ors*, where the solicitor acting not only for himself but also for the co-trustees and together were in custody of confidential communications, the court opined that professional privilege did exist. The House of Lords reasoned out on the basis that if one of several trustees were a solicitor, and the communications between him and his co-trustees would have been privileged if he were not a co-trustee, then surely if he were a co-trustee and simultaneously a solicitor all such communications would therefore still be privileged. Without going into the laborious facts, suffice for me merely to reproduce the head notes which read:

> Professional privilege as a ground for resisting production of documents by trustees is not displaced by the fact that the solicitor consulted is himself a trustee and is acting as professional adviser to himself and his co-trustees.

It was on those legal foundations, in particular the curtailment of s 126 of the Evidence Act 1950, that I rejected the application of the applicant which was pursuant to s 41 of the Probate and Administration Act 1959. I saw no legal impediment as to why the applicant should not request the trustees or executors of the estate of the late Tan Hon Huah for a copy of the will, or to request them to permit their solicitors to release a copy of the will. Pursuing this course of action by demanding the third defendant to release a copy of the will to the applicant, in particular by qualified legal practitioners was a foolhardy act and deserved some chastisement of sort.

It would appear that there was an attempt once in court to obtain that particular will but was unsuccessful. In spite of that failure, the applicant

again came before me to obtain that will by naming the same said Tetuan SK Khoo & Tan Tian Tiok, Advocate & Solicitor as the third defendant. This piece of information regarding the first abortive attempt was not denied by the solicitors for the applicant. Pursuant to this, on the issue of costs, Mr D'Cruz who appeared for the third defendant not unreasonably prayed that the solicitors be personally liable for the cost of the action by virtue of the vexatiousness of the action.

The relevant provision for the issue of cost is O 59 r 8 of the Rules of the High Court 1980 which reads:

> Subject to the following provisions of this rule, where any proceedings costs are incurred improperly or without reasonable cause or are wasted by undue delay or by any other misconduct or default the Court may make against any solicitor whom it considers to be responsible (whether personally or through a servant or agent) an order — ...
>
> (c) directing the solicitor personally to indemnify such other parties against cost payable by them.

I agreed with the submission of Mr D'Cruz and after dismissing the application thereafter ordered costs against the applicant's solicitors. For a solicitor's firm to be unaware of the provision of s 126 of the Evidence Act 1950, and its implications, surely did not deserve my sympathies.

Application dismissed with costs.

Reported by Loo Lai Mee